SUPREME COURT, U. S.
(39053)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

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ARGUMENT—The provisions of Article I, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter are constitutional. Those sections require a public employee to be discharged if he refuses to sign a waiver of immunity or to answer questions before a grand jury concerning the conduct of his office and the performance of his official duties. Any such testimony would be inadmissible in a criminal prosecution of the employee. The State Constitution and the City Charter sections have been construed to limit the required waiver to one restricted to conduct of his office and his official duties and to permit discharge of the employee only after he has had a hearing at which he has an opportunity to explain his refusal	9

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals [R. 41-47, 20 N Y 2d 227, 229 N. E. 2d 184 (1967)], affirming a judgment of the Supreme Court of the State of New York, Appellate Division, First Department [R. 37-39, 27 A D 2d 800, 279 N.Y.S. 2d 150 (1967)], which confirmed a determination of the Police

Commissioner dismissing appellant from the position of patrolman in the Police Department of the City of New York.

On January 29, 1968, this Court noted probable jurisdiction (R. 53).

Question Presented for Review

Where a police officer, after being called before a grand jury and refusing to sign a waiver of immunity with respect to testimony concerning the conduct of his office and the performance of his official duties, is granted a hearing at which he fails to offer any explanation of such refusal and is thereafter dismissed from his position pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, does such dismissal violate his rights under the United States Constitution when, if the police officer had testified before the grand jury, the testimony could not be used against him in subsequent criminal proceedings?

Facts

A. Charge Against Appellant

The charge against the appellant was, as follows (R. 22-23):

> "The District Attorney of New York County has advised the Police Commissioner that you were called and appeared before the Grand Jury of New York County on the 6th day of August, 1965, and that you refused to waive immunity from prosecution as provided in Section 1123 of the New York City Charter and Article I, Section 6 of the Constitution of the State of New York.
>
> "You are, therefore, directed to appear before a Trial Commissioner in the Board Room on the second

floor of Police Headquarters, 240 Centre Street, New York, New York, on the 10th day of August, 1965, at 2:30 P.M., to show cause why your employment as a member of the Police Department should not be terminated and your office vacated as prescribed by the aforesaid provisions of law."

B. Departmental Hearing

The charges against the appellant were tried before Leonard E. Reisman, Hearing Officer, on August 10, 1965. The appellant was present and was represented by counsel (R. 23).

At the hearing the Police Department introduced in evidence a letter from Assistant District Attorney Andreoli of the New York County District Attorney's Office, advising the Police Commissioner that appellant had refused to sign a limited waiver of immunity (R. 24, 26). A copy of the notice of the charge was offered in evidence and was objected to by the appellant, who also moved to have two other charges then pending against him included in this limited hearing. The Hearing Officer overruled the objection, denied the motion and admitted in evidence the letter from the District Attorney's Office and the notice of the charge (R. 24, 26).

Assistant District Attorney Andreoli's Testimony

Assistant District Attorney Andreoli testified that the appellant was called before the Second August 1965 Grand Jury in New York County on August 5, 1965, and was tendered a limited waiver of immunity but was not placed under oath (R. 27). He further testified that the appellant was advised that the Grand Jury "wished to question him concerning the conduct of his office in the performance of his duties" and, at appellant's request, there was an adjournment to enable him to discuss the limited waiver with his attorney (R. 28).

On August 6, 1965, appellant reappeared and was again advised of his rights and the nature of the investigation. The investigation sought to determine whether the crimes of conspiracy to bribe public officers had been committed, specifically concerning bribes by gamblers to police officers to aid in the continuance of unlawful gambling (R. 28).

The appellant then refused to sign a waiver of immunity because "his attorney told him he was a target of an investigation" (R. 20-21, 28, 29).

The Department next offered the unsworn statements of appellant before the Second August 1965 Grand Jury and a copy of the limited waiver of immunity, which were admitted in evidence over objection (R. 29-30, 12-22; Brief p. 22).

On cross-examination, Andreoli testified that appellant appeared before the Grand Jury pursuant to a subpoena and that he was a potential defendant of the investigation (R. 30). He further testified that, had the appellant signed the limited waiver of immunity, he would have been questioned at that time (R. 31).

The Court order releasing the Grand Jury minutes was then admitted in evidence (R. 32).

Appellant's Grand Jury Testimony

The grand jury minutes of the Second August 1965 Grand Jury, which had previously been admitted in evidence (R. 29-30), disclosed that appellant appeared as a witness and was not sworn. He was advised of the nature of the Grand Jury investigation, which he stated he understood and had been aware of since June of 1964 (R. 13). After his constitutional right to refuse to testify and the provisions of the Constitution of the State of New York and the New York City Charter with regard to refusal to testify concerning the conduct of his public office had been explained, appellant stated that he was represented by

counsel, who was not present. He requested an adjournment in order to show the limited waiver of immunity to his attorney. This request was granted (R. 14-18).

On August 6, 1965, appellant was recalled as a witness, but was not sworn. He was again informed of the nature of the Grand Jury investigation (R. 19-20). He stated that he had discussed his constitutional rights and his duty to testify with his attorney and stated, "On the advice of my attorney I have been regarded as a target of this investigation, and you have no authority to question me." He was then advised that he had been called before the Grand Jury as a public officer to testify concerning the performance of his duties as a police officer (R. 20-21). Appellant refused to sign the waiver of immunity (R. 21-22).

Motion to Dismiss

Decision was reserved on the appellant's motion to dismiss the charge on grounds that he had been subpoenaed and was a target of the investigation (R. 32-33).

Appellant's Case

Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign the waiver of immunity and testify before the Grand Jury (R. 33).

C. Commissioner's Determination

In the report of Hearing Officer Reisman, dated August 11, 1965, he found that appellant had been called before the Grand Jury and had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter. He recommended that appellant's employment be terminated and his office vacated (R. 33).

Based on these findings and recommendations, Police Commissioner Broderick ordered appellant's office vacated (R. 34).

Opinions Below

The Appellate Division, First Department, of the Supreme Court of the State of New York, confirmed without opinion the Police Commissioner's determination (R. 37-39, 27 A. D. 2d 800, 279 N.Y.S. 2d 150 [1967]).

The New York Court of Appeals, in its opinion by Chief Judge Fuld, unanimously affirmed the order of the Appellate Division (R. 41-47). It pointed out that the appellant was required by Section 1123 of the New York City Charter, as a condition of his continued employment by the Police Department, to waive his constitutional privilege against self-incrimination and to answer questions relating to the conduct of his office and performance of his official duties. The Court distinguished *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), stating that nothing decided in that case bore on the issue before the Court and that any testimony of misconduct in office would be inadmissible in a criminal prosecution. It said that *Spevack* v. *Klein*, 385 U. S. 511 (1967), was also distinguishable in that *Spevack* involved the responsibilities of a licensed attorney rather than those of a State employee. Chief Judge Fuld concluded (R. 43-44):

> "In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted 'employee insubordination for failure to give information which * * * the State has a legitimate interest in securing' (*Nelson* v. *Los Angeles County*, 362 U. S. 1, 7, *supra:* see *Spevack* v. *Klein*, 385 U. S. 511, 519, *supra* [per Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force."

Constitutional Provision and Statute Involved

Section 6 of Article I of the New York Constitution provides, as herein pertinent, as follows:

§ 6. (Grand Jury; protection of certain enumerated rights; waiver of immunity by public officers; due process.)

"* * * No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

The New York City Charter, Section 1123, provides as follows:

"§ 1123. Failure to testify.—If any councilman or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive im-

munity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Summary of the Argument

In the cases of *Beilan* v. *Board of Education*, 357 U. S. 399 (1958), *Lerner* v. *Casey*, 357 U. S. 468 (1958), and *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), this Court sustained the dismissals of public employees, after appropriate administrative hearings, based upon the employees' failure to explain their refusal to answer questions relating to their employment in an investigation of matters of legitimate concern to the state or agency involved or their refusal to take a loyalty oath. The appellant, a police officer, refused to execute a waiver of immunity and testify before a Grand Jury which was investigating a conspiracy to bribe police officers to permit illegal gambling. At his administrative hearing, appellant offered no explanation to justify his failure to disclose all known information concerning this conspiracy to bribe public officers. Such action constituted employee insubordination and properly required his dismissal.

The due process requirement relied on in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), has been fully complied with. The more recent cases of *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967), are distinguishable.

Where a police commissioner obtains or is given some evidence, or apparently responsible charges are made, of wrongdoing on the part of a police officer, it would be substantially destructive of effective and honest operation of the government of a city if the police officer could, without fear of discipline, refuse to answer relevant questions.

The Fifth Amendment does not bar such questioning by a superior officer since the answers cannot be used in any criminal proceeding brought against a police officer who answers the questions. Nor should it be held to require that, when such an officer refuses to answer such questions, he must be continued in his public office despite such insubordination. If this contention is sound, it would seem that it should also be applicable to refusals to answer similar relevant inquiries by a grand jury concerning the conduct of his office or the performance of his official duties.

ARGUMENT

The provisions of Article I, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter are constitutional. Those sections require a public employee to be discharged if he refuses to sign a waiver of immunity or to answer questions before a grand jury concerning the conduct of his office and the performance of his official duties. Any such testimony would be inadmissible in a criminal prosecution of the employee. The State Constitution and the City Charter sections have been construed to limit the required waiver to one restricted to conduct of his office and his official duties and to permit discharge of the employee only after he has had a hearing at which he has an opportunity to explain his refusal.

(1)

Pertinent to a consideration of the constitutionality of Article I, § 6,[1] of the New York Constitution and New York City Charter § 1123 is a brief review of the back-

[1] Similar statutory provisions are contained in: District of Columbia, D. C. Code § 1-319 (Supp. 1958); Louisiana, La. Const. Art. 14, § 15 (P)(1), La. Rev. Stat. Ann. § 38:2128 (1950); Maryland, Md. Ann. Code, Art. 69 § 11 (1953); New Jersey, N. J. Stat. Ann. § 2A:81-17.1 (Supp. 1964).

ground and history of the Charter provision's predecessor § 903. That section was prepared by the Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and it was submitted to the people at the 1936 general election. It was adopted and became effective on January 1, 1938.

The enactment of a new charter was the outgrowth of an investigation into alleged graft and corruption in the government of New York City in the course of which numerous City employees had refused to testify as to official acts on the ground that their testimony might incriminate them. This spectacle of public employees and officers exercising their Fifth Amendment privilege brought about a realization on the part of the Joint Legislative Committee and the general public that public officers and employees should not be permitted to remain on taxpayer-supported payrolls if they invoke their privilege against self-incrimination concerning their official conduct and duties before duly empowered investigating agencies.[2] The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the City employees.

A similar constitutional provision, Article I, § 6, of the New York Constitution, confined in its application to public officers, was also approved by the people on November 8, 1938. This amendment also provided for the grant to the grand juries of the express power to inquire into the wilful misconduct in office of public officers, which power was never to be suspended or impaired by law. A New York City police officer is a public officer. *Canteline* v. *McClellan*, 282 N. Y. 166, 170, 25 N. E. 2d 972 (1940); *Matter of Ryan* v. *City of New York*, 228 N. Y. 16, 19, 126 N. E. 350 (1920).

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[2] *In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10.

(2)

The appellant argues that to dismiss him for refusing to waive immunity and testify before a grand jury constitutes a violation of his rights under the Fifth Amendment, even though any testimony would be inadmissible against him in a criminal proceeding. He relies primarily on the cases of *Slochower* v. *Board of Education*, 350 U. S. 551 (1956); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967).

Slochower involved the summary dismissal of a teacher at a public college pursuant to § 903 of the New York City Charter (predecessor to the present § 1123), because he had refused, before a Senate Subcommittee on Internal Security, to answer questions concerning his membership in the Communist Party. The opinion of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. This Court also recognized that the problem of balancing the municipal employer's interest in the loyalty of those in its service with the traditional safeguards of individual rights was a "continuing one". 350 U. S. at p. 555. The opinion went on to say that Section 903, as interpreted and applied, operated to discharge every employee who invoked the Fifth Amendment and that the questions asked were being taken as confessed without consideration being given to such factors as the subject matter of the questions or justification for the exercise of the privilege. 350 U. S. at p. 558.

The opinion then said (pp. 558-559):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs or

> government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred, that is, a Congressional committee investigating loyalty, not the official conduct of city employees. The other emphasized the automatic discharge for exercising the Fifth Amendment privilege before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer, before acting, to consider the circumstances of the refusal to answer.

Subsequent to *Slochower* this Court held that state statutes authorizing the dismissal of public employees who fail to answer questions relating to employment in an investigation of matters of legitimate concern to the state or agency involved do not violate due process where a hearing is held prior to such a dismissal. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellants were dismissed, pursuant to a relevant statute, after a hearing before an appropriate administrative body at which time they were given the opportunity to explain their refusals to testify or to take loyalty oaths. The ultimate dismissal in each instance was based, not on the mere refusal to testify or sign a loyalty oath, but on the breach of a legitimate condition of employment that the refusal reflected.

In the *Lerner* and *Beilan* cases, it would appear that Mr. Justice Douglas, with whom Mr. Justice Black concurred, based their dissent covering both cases on the propriety of the government concerning itself with the opinions and beliefs of its employees. 357 U. S. at p. 415. The dissent, however, did recognize the right of the government to inquire into the "actions of men," such as the fitness of the public employee for his job depending on health, promptness, and record for reliability. 357 U. S. at p. 415.

Dissenting in a separate opinion in the *Lerner* case, Mr. Justice Brennan stated (357 U. S. at p. 422):

> "But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications of employment. It may well be that in such a case the State would be fully justified in discharging the employee as 'untrustworthy and unreliable.'"

Various state courts have upheld similar dismissals of police officers for refusal to testify before a Grand Jury or to sign waivers of immunity.[3]

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section and Article I, § 6, of the New York Con-

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[3] See *Christal* v. *Police Commission*, 33 Cal. App. 2d 564, 92 P. 2d 416 (1939); *Drury* v. *Hurley*, 339 Ill. App. 33, 88 N. E. 2d 728 (1949), cert. denied, 339 U. S. 983 (1950); *Fallon* v. *New Orleans Police Department*, 238 La. 531, 115 So. 2d 844 (1959); *McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892); *Roche* v. *Police Commissioner*, 33 Cal. App. 2d 574, 92 P. 2d 422 (1939); *Soudler* v. *Philadelphia*, 305 Pa. 1, 156 A 245 (1931). Cf. *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248 (1907).

stitution as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A. D. 2d 737, 263 N.Y.S. 2d 360 (1965). The rule was applied in two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc. 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the appellant herein was given a hearing and thereafter dismissed. The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A. D. 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending. In the present action Chief Judge Fuld added the further element to the interpretation of the provisions, that "his testimony would be inadmissible in a criminal prosecution" (20 N Y 2d at p. 230, 229 N. E. 2d at p. 186).

In *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), it was held that answers given by police officers to questions asked them in the course of an Attorney General's investigation could not be used against them in a criminal prosecution. The answers were excluded on the ground that they were coerced confessions because the police officers were faced by a choice of either answering the questions or forfeiting their jobs by reason of a New Jersey forfeiture of office statute similar to the New York Constitution and City Charter provisions here involved. This Court did not pass on the validity of the forfeiture of office statute. It confined itself to holding that answers given under threat of its application are coerced and, therefore, cannot be used in a criminal prosecution of the police officers.

In the companion case of *Spevack* v. *Klein*, 385 U. S. 511 (1967), this Court held that a lawyer cannot be disbarred because he invoked the Fifth Amendment as the ground for refusing to honor a subpoena to produce financial records and for refusing to answer questions relevant to charges of misconduct in carrying on his law practice. It said that the threat of disbarment was a powerful form of compulsion to make a lawyer relinquish the Fifth Amendment privilege.

Mr. Justice DOUGLAS, who spoke for the majority in both the *Garrity* and *Spevack* cases, wrote the following footnote in the *Spevack* opinion (385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach."

Mr. Justice FORTAS, in his concurring opinion in that case, said (385 U. S. at p. 519):

> "But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

The quoted reservations apparently apply to an automatic discharge of a police officer for refusing to testify. Here the dismissal was not automatic. At the hearing granted appellant subsequent to his refusal to waive immunity, he failed to offer any explanation for such refusal.

(3)

The *Garrity* case, in any event, would appear to remove any basis for a refusal by a police officer to answer questions concerning his official duties when questioned either by the Police Commissioner or before a grand jury even though *Garrity* had not been decided at the time petitioner appeared before the grand jury or at the time of his disciplinary hearing. That case establishes that his answers may not be used against him in a criminal proceeding.

Obviously this ruling would also extend to any evidence discovered as a result of his answers.

In view of the unavailability of the answers for use in any criminal proceeding, the Fifth Amendment should not be extended to bar questioning of police officers to obtain information concerning crime or to determine whether they have been guilty of misconduct in performing their official duties. It is true that the immunity obtained as a result of giving answers when so questioned is not given with the formality of a specific grant of immunity and that the scope of the immunity is not so broad as that given under such a grant. The immunity, however, would appear to be broad enough to satisfy Fifth Amendment requirements since it extends to the answers and the fruits of the answers. In *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52, 79 (1964), this Court held that a similar immunity with regard to federal prosecution, limited to compelled testimony and its fruits, satisfied the requirements of the Fifth Amendment.

(4)

Steinberg v. *United States*, 141 Ct. Cl. 1, 163 F. Supp. 590 (1958), relied on by appellant, held that a statute which *automatically* revoked a federal pension as of the date that the pensioner refused to testify before a grand jury, federal court or congressional committee was invalid. The Court relied on the *Slochower* case.

Appellant also relies on *United States* v. *Lovett*, 328 U. S. 303 (1946). In *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), this Court distinguished a statute, analogous to the sections here involved, from the Congressional Act found unconstitutional in the *Lovett* case, stating (p. 723):

> "Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed the statute in the *Lovett* case did not declare general

and prospective operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

It is evident from an examination of Article I, § 6, of the New York Constitution and § 1123 of the New York City Charter that the sections were not directed at any individuals specified by name as in the *Lovett* case.

(5)

A police commissioner has a right to question members of his force with regard to the performance of their official duties to determine their fitness for office or with regard to information they have obtained concerning crimes. If a police officer may not be removed because he refuses to answer questions about his official duties, asserting his privilege under the Fifth Amendment even though his answers cannot be used against him in a criminal proceeding, it would mean that such a refusal to answer questions put to him by the Police Commissioner also could not furnish a basis for his removal. The Police Commissioner, having appointed the appellant to his position of public trust and civic responsibility, could not inquire into the performance of his official duties after the Commissioner obtains information indicating improprieties on his part or after accusations are made concerning his integrity.

Such a limitation on a police commissioner's power to interrogate members of his force would deprive superiors and official bodies of a power essential to the maintenance of a viable government, municipal, state or federal. It would mean that police officers, men who are appointed to enforce the laws and who are, in a position

to gain ready access to homes and business establishments, may refuse to answer accusations or even evidence that they have been faithless in performing their duties. And it would mean that they may continue to act as police officers until and unless evidence can be obtained clearly showing that they have violated their duty.

A few examples of situations which have arisen or are likely to arise illustrate how difficult, if not impossible, it would be to operate a city effectively and honestly if police officers or other employees could refuse, with impunity, to answer questions concerning suspicious circumstances in which they are involved: A citizen reports that he has seen a specific policeman enter various bars and grills, speak in a whisper to the owner and receive money from the owner. A paper is found in a police officer's lost memorandum book on which there is a list of various businesses in his precinct and amounts alongside the names of these businesses, strongly indicating that Christmas gifts were being improperly solicited by him. An Assistant Corporation Counsel fails to call to the witness stand someone who, it appears, would have been a key witness for the City in the defense of the action. Shortly after a building inspector examines a building in a slum area and reports that there are no building violations, his superior inspects the building and discovers several, readily observable, life-endangering violations. Innumerable analogous examples could be cited.

In these examples the evidence available to the Commissioner, standing alone, is not ordinarily sufficient to justify the dismissal of the police officer or other employees who, under New York law, may not be dismissed without a hearing on charges supported by substantial evidence. Under these circumstances it seems eminently proper for the Commissioner to question the public employee concerning the matter. A refusal to answer pertinent questions constitutes insubordination and lack of candor. It is this insubordination and lack of candor that

justify dismissal. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

If such a refusal to answer a question by the Police Commissioner can furnish a basis for his removal, there would appear to be no sound reason for holding that the refusal to answer questions put to a police officer concerning the performance of his official duties or his knowledge of crimes learned in the performance of such duties by any other body authorized to examine into such matters, improper conduct or malfeasance or crimes, does not furnish a basis for removal.

It should be recalled that the Grand Jury investigation was concerned with a conspiracy to bribe police officers to permit illegal gambling operations, that the appellant was advised of the nature of the investigation and that he was requested to sign a limited waiver of immunity so that he could be questioned without obtaining immunity. The waiver was limited to matters "concerning the conduct of my office on the performance of my official duties".

Appellant, as a police officer, had a duty to furnish the appropriate authorities with information pertinent to his employment and his knowledge concerning crimes. This is especially significant where the conduct in question relates to the administration of justice and his part in maintaining or failing to maintain the integrity of the Police Department. His refusal to sign a limited waiver of immunity in this investigation so that he could be questioned without obtaining immunity concerning the bribery of police officers and his failure, at his hearing, to give reasons for his refusal are inconsistent with his duty as a police officer. Having breached his duty, appellant was properly dismissed.

Particularly apt is the following statement in *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248, 261-262 (1907):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if

possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police officer on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

(6)

Appellant also argues that he was illegally subpoenaed before the Grand Jury and attempts to make this an equal protection of the law issue (App. Brief, pp. 11-13). This argument was not made in the New York courts. Nor was it mentioned in the Jurisdictional Statement.

In the New York courts the appellant merely argued that a target of an inquiry may not be brought before a grand jury by subpoena. No mention of equal protection was advanced in relation to this argument. Appellant merely relied on New York cases which did not discuss any equal protection issue.

While in his Jurisdictional Statement, although not in the "Question Presented," appellant did argue equal protection, that argument was limited to the issue of burden of proof of misconduct. Appellant contended that other public employees may be removed only where the department bringing the charges sustains the burden of proof of misconduct, while those in the position of the appellant are, in effect, required to sustain the burden of proof that they were not guilty of misconduct. Such an equal protection issue obviously is different from appellant's present argument that equal protection is denied by requiring a public officer to appear before a grand jury

pursuant to subpoena even though he is a target of the investigation while others who are targets of an investigation may not be subpoenaed.

Moreover, with regard to equal protection, it is reasonable and proper to draw a distinction between public employees and other persons who are targets. They have a special responsibility to the community which justifies such inquiry.

There are additional reasons barring the presentation of the equal protection argument to this Court. The petition in the New York Supreme Court instituting this proceeding alleges in general terms that there has been a denial of equal protection of the laws (Par. "Sixth", R. 4). The issue, however, was not presented to the New York Appellate Division or to the Court of Appeals. Furthermore, there is not the slightest indication that the New York courts ever considered the issue. It would appear, therefore, that it cannot be raised on this appeal. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344 (1920); *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 433-434 (1940); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1946). Moreover, the reference in the petition to equal protection of the laws does not specifically refer to the United States Constitution and makes it clear that appellant is not relying on an equal protection clause in Article I, § 11, of the New York Constitution. *Kansas Endowment Asso.* v. *Kansas*, 120 U. S. 103, 104 (1887).

In any event, the appellant's equal protection argument lacks merit. It appears to assume that we are dealing with a case where the police officer has testified before a grand jury and that such testimony is being used as the basis for a dismissal. That is not what occurred in the present case. At the least, the argument assumes that the New York Court of Appeals has held that the burden of proof of misconduct, which ordinarily is on the party seeking to have a police officer dismissed, is on the appellant in the present case.

All that the New York Court of Appeals held, however, is that a police officer who has refused to furnish information to a grand jury regarding the conduct of his office and the performance of his official duties may be discharged unless, at his disciplinary hearing, he offers an appropriate explanation for such refusal. This holding applies to all police officers. Even if it varies from the rule applicable under other circumstances, it is reasonable; and it is not discriminatory because of its uniform application to all police officers pursuant to the New York Constitution and the New York City Charter, as interpreted since the *Slochower* decision.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be affirmed.

April 11, 1968.

Respectfully submitted,

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Norman Redlich,
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APPENDIX

Waiver of Immunity (Department's Exhibit 4).

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, ET AL.

I, , residing at
occupying the office of
in the of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment prosecution and punishment for or on account of, regarding or relating to any matter, transaction or things, concerning the conduct of my office on the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence documentary or otherwise, before the Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury:

Dated: New York, N. Y.

Witness:

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of , 196 , before me personally appeared , to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.